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In the
Supreme Court of the United States
OCTOBER TERM, 1943

No. 350

On Writ of Certiorari to the Supreme Court of the State of Oklahoma

PUBLIC SERVICE COMPANY OF OKLAHOMA, a Corporation,
Petitioner,

vs.

JOE T. PARKINSON, County Treasurer of Tulsa County, Oklahoma,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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Oklahoma City, Oklahoma,
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September, 1943.

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In the
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No.

PUBLIC SERVICE COMPANY OF OKLAHOMA, a Corporation,
Petitioner,

vs.

JOE T. PARKINSON, County Treasurer of
Tulsa County, Oklahoma,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO BE DIRECTED TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA**

To the Honorable Harlan Fiske Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, above named, respectfully shows:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner, an Oklahoma public service corporation, on December 9, 1938, filed its petition in cause No. 66621 in the District Court of Tulsa County, Oklahoma, to recover $8,088.71, which it had paid to respondent, under protest. Such

suit was authorized by Section 7, Subd. B, Art. 1, Chap 107, Session Laws of Okla. 1915 (Sec. 12665, Okla. Stat. 1931; repealed in 1941, but see 1941 Act in exactly the same language, 68 Okla. Stat. 1941, Sec. 15.50). Said sum was shown on respondent's tax books as due from petitioner for 1938 taxes for sinking funds of four school districts which had been disorganized prior to 1938 (see petition, R. 2-7). Petitioner sought to recover said sum on two grounds, namely:

(1) That none of its property in the area of any of said former districts on January 1, 1938, had been separately valued or assessed as having 1938 taxable situs therein by the State Board of Equalization, which has exclusive authority, under Sec. 21, Article 10, Oklahoma Constitution, to assess property of public service corporations;

(2) That the 1938 rates of levy appearing on the tax books for each of said four districts are void because the County Excise Board computed said rates without reference to a lawfully determined *total* of 1938 assessed valuations of all property present in any of said former districts on the assessment date.

Before said suit was filed, Texas-Empire Pipe Line Co., and others, protested the same four rates of levy, complaining that each was void for the same reason as set forth in (2) above. Petitioner was not a party to said proceeding, but it was a class action for the benefit of all similarly situated. It was filed in the Court of Tax Review of the State of Oklahoma, which, under 68 Okla. Stat. 1941, Secs. 331-341, has exclusive jurisdiction over complaints against tax levies on alleged grounds of illegality, either in whole or in part. Said court dismissed said protest for lack of jurisdiction to

consider said ground of complaint. On appeal, the Supreme Court of the State of Oklahoma affirmed, and expressly approved the dismissal on the said ground. *Texas-Empire Pipe Line Co. et al.* v. *Tulsa County Excise Board* (No. 29210), 187 Okla. 591, 104 Pac. (2d) 441. A complete copy of said opinion appears as Appendix "A" hereto.

On June 20, 1941, after said appeal cause No. 29210 was finally decided, petitioner filed its First Amended Petition (R. 7-21), pleading and attaching a certified copy of the mandate and opinion entered in said appeal cause.

The appellate court's decision in that case turned entirely on the court's statement, which reads:

> "We find that the question before this court is not one pertaining to an illegal levy, but is one of an alleged illegal application of the levy."

After making that statement, and stating that the Court of Tax Review has no authority to consider such a question, the court cites prior decisions wherein it had determined that complaints against illegal application of tax levies to specific properties were properly determinable in proceedings authorized by the statute, *supra,* under which petitioner brought this action. *Missouri, K. & T. Ry. Co.* v. *Cowden,* 184 Okla. 260, 86 Pac. (2d) 776, and other cases. Said statute provides that, in cases where no other remedy is provided, an aggrieved taxpayer may pay the tax under protest and, within thirty days thereafter, sue the collecting officer for recovery thereof.

The background of the controversy may be summarized as follows:

(a) According to public records, in 1926 School Districts 4, 12 and 28 of Tulsa County were disorganized and their areas were annexed to School District No. 22 (the Tulsa City District), and in 1933 Consolidated School District No. 1 of Tulsa County was disorganized and its area was annexed to said District 22;

(b) 1926 and 1933, respectively, were the last years, prior to 1938, in which separate sinking fund levies were made to provide for debts contracted prior to the annexations; in each intervening year District 22 made a single sinking fund levy to provide for (1) said debts, and (2) all debts which it, itself, had contracted both prior to, and subsequent to, said annexations (See statement by defendant's counsel at the trial, R. 27, and see fifth grammatical paragraph of the Oklahoma Supreme Court's opinion in the Texas-Empire Pipe Line Company case—Appendix "A" hereto);

(c) In the years between the dates of said annexations and 1938, no property within District 22 was separately valued and assessed as having taxable situs within any of the said four annexed areas (See defendant's counsel's statement at the trial, R. 27-28);

(d) In November, 1937, the Oklahoma Supreme Court finally decided *M. K. T. R. Co.* v. *Excise Board of Bryan County*, 181 Okla. 229, 73 Pac. (2d) 173. Therein it was held that separate levies should be made, annually, on property within the areas of disorganized school districts to provide sinking funds for debts contracted prior to disorganization.

(e) In rendering properties for 1938 assessments, *all* public service corporations owning property within said District 22 rendered them in the same manner as in each of the years between said annexations and January 1, 1938. Said renditions were accepted and the properties of *all* public service corporations were *so* assessed by the State Board of Equalization. Said board certified all such assessments to the Tulsa County assessor, accordingly (Testimony of Dan Rowe, county assessor, R. 35);

(f) On July 27, 1938, the county assessor delivered to the county excise board a document entitled: "Assessor's Report to Excise Board 1938 Showing an Abstract of All Valuations of Taxable Property in Each School District, Township and City in Tulsa County" (R. 66-67; record of offer not printed—offer shown at page 109 of the typewritten transcript). Said abstract was required by Section 9, Chapter 115, Session Laws of Oklahoma 1933 (Repealed 1941, but see 68 Okla. Stat. 1941, Sec. 15.54, embodying substantially the same provisions). In said abstract none of said disorganized districts are mentioned.

(g) On August 2, 1938, at the county excise board's request (see defendant's counsel's statement at R. 28 and see 7th grammatical paragraph of opinion in cause No. 29210 in Appendix "A" hereto), the county assessor delivered to said board another document (Pleaded at R. 11, admitted in paragraph 2 of answer at R. 22), which reads as follows:

"To the Honorable Excise Board:

"We submit to you the following valuations, located in old School Districts Number 28, Number 12, Number C-1 and Number 4, all now in School District Number 22.

"Number 12

	Real Estate	$898,905
	Personal	35,855
	Corporation	50,350
26—	Public Service	335,473
		$ 1,320,583

"Number 4

	Real Estate	$4,345,710
	Personal	36,610
	Corporation	1,270
26—	Public Service	118,684
		$ 4,502,274

"Number 28

	Real Estate	$ 948,493
	Personal	49,990
	Corporation	482,890
26—	Public Service	2,590,051
		$ 4,071,424

"Number C-1

	Real Estate	762,252
	Personal	16,000
	Corporation	115,750
33—	Public Service	339,969
		$ 1,233,971

"This the 2nd day of August, 1938.

(Signed) "Dan A. Rowe,
"County Assessor.

(Signed) "Andy Stokes,
County Clerk."

"(Seal)

The excise board then fixed rates of levy for sinking fund needs of said four disorganized districts, using, as the very groundwork for its computations, the valuations shown in the last-mentioned document, and certified same to the county assessor, who then entered said rates on the tax rolls as a charge against property therein shown as liable therefor (See paragraph 14, R. 12, and stipulation admitting the material allegations thereof, R. 38).

To show any public service corporation property as liable for said rates, the assessor resorted to copying, on the 1938 tax rolls of three of said disorganized districts, the 1926 assessed valuations of such property as fixed by the State Board of Equalization. That is, in most cases (See *1 below), he showed that owners of such property in the areas of said three districts on January 1, 1938, were liable for 1938 taxes computed by applying said rates to a sum equal to the assessed valuations of such property which the same corporations owned therein on February 1, 1926 (See *2 below). As to such property within the area of Disorganized District Con. 1, he followed the same plan by copying the assessed valuations of property therein on February 1, 1933 (See *2 below). See assessor's testimony at R. 48-49.

The trial court rendered a general judgment in favor of respondent (Journal Entry of Judgment, R. 78). On appeal

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(*1) See statement on page 10 hereof as to different method followed in setting valuation on petitioner's property in area of Disorganized District 28.

(*2) March 7, 1933, assessment date was changed to January 1. Sec. 1, Ch. 104, Session Laws 1933, Am. Sec. 7338, R. L. 1910 (Sec. 12669, Okla. Stat. 1931).

the Supreme Court of the State of Oklahoma affirmed (R. 81, *et seq.*). For convenience, a copy of said opinion is attached hereto as Appendix "B."

In said opinion, disposing of the contention that the rates were illegal because they were computed without reference to *total* legally assessed valuations, the appellate court used ten words, reading as follows:

> "The legality of the rate of
> levy has been established."

As authority for that treatment of said issue, the Court cites its decision in *Texas-Empire Pipe Line Co. et al.* v. *Tulsa County Excise Board, supra,* by which, as aforesaid, the court did not pass on said ground of complaint, but affirmed the Court of Tax Review's dismissal of the proceeding on the express ground that said court lacked jurisdiction to consider such ground.

To facilitate presentation of a reasonably short statement as to what the record shows with reference to the first-mentioned phase or ground of petitioner's complaint, namely, that its property was never lawfully assessed as having 1938 taxable situs within the areas of any of said four disorganized districts, in the attached copy of the opinion in this case (Appendix "B"), certain matter has been italicized. When read consecutively, the italicized portions disclose the basis for the affirmance of the trial court's judgment on that phase of the case.

At this point, however, it is deemed necessary to quote briefly from said opinion as follows:

"* * * We agree that the county assessor is without power to make a record contrary to the action of the assessing board, or that he has discretionary powers of assessment in such a case as this.

"The record made by him in this case, however, is not shown to be in conflict with the action of the state board. This appeal record contains no proof that the assessing board *affirmatively* fixed the taxing situs of this property *other than* as reflected by the final tax rolls as made to appear by the proper officer, the county assessor.

"These final tax rolls did reflect a further segregation of the total valuations beyond that shown by the State Auditor's certificate, but it does not result in direct conflict therewith."

The "State Auditor's Certificate," referred to in said opinion, is endorsed on the first page of the two-page "Summary of Assessment" (R. 65, received in evidence R. 36). It seems that the court's references to the "State Auditor's Certificate" are directed to the said "Summary of Assessment," which, along with the detailed assessment list thereto attached, is authenticated by said certificate.

Concerning said two-page summary, the county assessor testified (R. 35-36) that they are the first two pages of the "certified assessment" of petitioner's property as of January 1, 1938, and that said two pages constitute a complete summary of the 1938 assessment of petitioner's property as transmitted to him by the State Board of Equalization, and that thereon all of the school districts mentioned in the return, itself, are reflected.

On cross-examination of petitioner's witness Markley, who was then holding in his hands, and examining, peti-

tioner's 1938 return and the State Board of Equalization's certified assessment of the properties therein listed, defendant's counsel elicited testimony that it is impossible to determine, from data appearing on the face of said document, that any particular portions of the listed properties were located within any of said four areas annexed to District 22. Counsel inquired if segregation of the listed properties to the said areas within District 22 might be accomplished by mathematical calculations applied to data appearing on the face of the return and assessment. Witness answered in the negative. Counsel then asked if such result might be obtained by employing engineering data and mathematical calculations if the locations of particular properties were known. Witness answered: "Yes, you would have to get your old district boundaries, and then go out and count a lot of poles and wire and a lot of meters and transmitters" (R. 58).

In petitioner's case, as to its property in Disorganized District 28, said assessor entered on the 1938 tax rolls, as the taxable valuation of petitioner's property, the sum of (a) $25,473, the 1926 assessed valuation of property which petitioner owned in said district on February 1, 1926, and (b), $1,923,313, the 1926 assessed valuation of property therein on February 1, 1926, which was then owned, rendered for assessment by, and assessed to, Oklahoma Power Company, *a different corporation,* which, in the intervening years, had sold its property in said district to petitioner (See R. 62-63). He applied said rates to said sum and extended the result on the tax rolls, thereby showing that petitioner owed

$7,750.71 of the sum here in controversy, as 1938 taxes for the sinking fund of Disorganized District No. 28 (See paragraph 19 of First Amended Petition at R. 14, and see stipulation admitting the allegations thereof as true at R. 44; also, see testimony of petitioner's witness, Markley, R. 53-55).

In his opening statement, defendant's counsel conceded that the valuations used in computing petitioner's taxes were not correct (R. 29). Counsel advised the court that several lawsuits, similar to this one, had been filed against respondent by other taxpayers to recover payments which they had made, under protest, as a result of said rates of levy and the very procedure of which petitioner complains. Counsel said that each of those cases had been disposed of on one of two bases, namely:

> (1) Where taxpayer conceded that it had property on January 1, 1938, within the area of one or more of said disorganized districts and that the assessed valuation of property within each such area had been fixed by the State Board of Equalization at a sum in excess of the valuation shown on the tax rolls, the cases were dismissed;
>
> (2) Where taxpayer conceded that it had property on January 1, 1938, within the area of one or more of said disorganized districts, and respondent conceded that such property in each such district had been assessed by the State Board of Equalization at a valuation less than the valuation shown on the tax rolls, the tax had been reduced (R. 29-30).

Counsel's statement forcibly demonstrates that the tax rates are void because they were computed without reference to the *total* legally assessed valuation of property within

the respective areas. For those suitors whose taxes were reduced, the rates used were lower than would have been levied if their properties, for rate-determining purposes, had been valued as low as they were valued for the purpose of computing the reduced taxes. The procedure resulted in rates discriminatory as favoring such suitors and, therefore, said rates are discriminatory, as prejudicing every other taxpayer in the affected areas.

The contents of the record summarized in the six last-preceding paragraphs, were ignored completely by the trial court, and by the appellate court. The appellate court could not have arrived at the conclusion that the acts of the county assessor are not shown, by the record, to be in conflict with the actions of the state board if it had given consideration to the portions of the record which have just been discussed. It had no authority to ignore those matters, under its own controlling decisions. *Smith* v. *Graham,* 123 Okla. 258, 253 Pac. 55. See *Beyer* v. *Le Fevre,* 186 U. S. 114, 46 L. ed. 1080.

Because of that treatment of the record on said issue, the judgment denying relief thereon is based upon non-federal grounds which are not substantial, but which are treated as authorizing disposition of the case without considering the Federal constitutional questions raised in the trial court, and in the appellate court, and the petitioner's rights guaranteed by the Fourteenth Amendment to the Federal Constitution were violated thereby.

The whole record is before the Court in this proceeding. Petitioner says that the record shows this to be a proper case for the exercise of this Court's authority to review the evidence and order judgment entered in accordance therewith. *Ward et al., Petitioners,* v. *Board of County Commissioners of Love County, Oklahoma,* 253 U. S. 17, 64 L. ed. 751; *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux,* 279 U. S. 737, 73 L. ed. 931.

II. JURISDICTION

Pursuant to this Court's Rule 38, paragraph 2, petitioner submits, as required by this Court's Rule 12, paragraph 1, the following statements as disclosing the basis upon which this Court's jurisdiction is invoked to review, by certiorari, the judgment rendered by the Supreme Court of the State of Oklahoma in cause No. 30852 appearing on that Court's docket affirming, on appeal, the judgment of the District Court of Tulsa County denying petitioner any relief and assessing costs against petitioner in cause No. 66621 appearing on the docket of said trial court.

1. The statutory provision believed to sustain said jurisdiction is Section 344 (b) of Title 28 of the United States Code (Judicial Code, Sec. 237, amended), 28 U. S. C. A., Sec. 344 (b), 43 Stat. L. 937, which provides that it shall be competent for this Court to so review a final judgment which has been rendered by the highest court of a state in which a decision can be had, in any case where is drawn in question the validity of a statute of any state on the ground of its

being repugnant to the Constitution of the United States, or in which any title, right, privilege or immunity is specially set up or claimed by any party under the Constitution of the United States.

2. In this case, there is drawn in question the validity of the ordinances, levying the taxes complained of, on the ground that they are repugnant to the Federal Constitution. Such an ordinance is a "Statute of a State" within the meaning of that term as used in said code provision.

Determination of the validity of ordinances enacted by legislative bodies of political subdivisions of a state is within this Court's jurisdiction under said code provision. *Zucht* v. *King*, 260 U. S. 174, 67 L. ed. 194.

The contents of said tax-levying ordinances are stated only in substance in the record. They are not published; they consist of orders of the county excise board fixing rates pursuant to written estimates of needs transmitted to said board by the governing board of the taxing units. Such have been held to be "ordinances levying taxes" within the meaning of Section 19, Article 10, Oklahoma Constitution. *St. L.-S. F. Ry. Co.* v. *Tate*, 35 Okla. 563, 130 Pac. 941. In paragraph 14 of its First Amended Petition (R. 12) petitioner alleged that the county excise board fixed the rates pursuant to estimate of needs and order levying the taxes which had been prepared by and submitted to it by the governing board of School District No. 22, fixing said rates by giving consideration to a document prepared by the county assessor without authority (see paragraphs 11, 12, 13, 14, 17, R. 11-13),

and not with reference to an abstract of 1938 assessed valuations as required by law.

This Court's jurisdiction to so review said judgment under said code provision is invoked on the further ground that petitioner "specially set up and claimed" violation of its rights, privileges and immunity under the Fourteenth Amendment to the Federal Constitution on June 20, 1941, when it filed its First Amended Petition (R. 7-21), and particularly numbered paragraphs 7, 10, 11, 12, 13, 14, 16, 17, 18, 20 and 23 thereof. In said paragraph 20 (R. 15) petitioner alleges that the acts of the county assessor, complained of, were performed without petitioner's consent or knowledge, without notice to petitioner and without affording petitioner an opportunity for hearing. In said paragraph 23 (R. 16), petitioner specifically pleads that, by the procedure followed in making the levies, and in entering certain sums as ~~that~~ the taxable valuation of its properties within said disorganized districts for their 1938 tax purposes, and in enforcing the said tax-levying ordinances, the taxing officials took petitioner's property without due process of law, and denied petitioner equal protection of the law, in violation of said Fourteenth Amendment. Those allegations are believed to sufficiently state a federal question. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 33 L. ed. 892; *Bellingham Bay & B. C. R. Co.* v. *New Whatcom,* 172 U. S. 314, 43 L. ed. 460. Said pleas were made at a proper time to invoke the court's jurisdiction to consider them. *Protest of C. R. I. & P. Ry. Co.,* 151 Okla. 129, 2 Pac. (2d) 935.

3. The case was tried in Tulsa County District Court without intervention of a jury. General judgment in favor of the respondent and assessing costs against petitioner was pronounced June 26, 1941 (minutes, R. 24; J. E. of Judgment, R. 78). Motion for new trial was filed within time permitted by statute; it included complaint that the judgment was erroneous on grounds (2) that it is not sustained by any evidence; (3) that it is contrary to all the evidence; (4) that it is contrary to law; (6) that it is unauthorized by law. Said motion was overruled November 8, 1941, and notice of intention to appeal to the Supreme Court of the State of Oklahoma was given the same day in open court (R. 79).

Petition in error attached to case-made, comprising all the papers and record of proceedings in the trial court, was filed in the Supreme Court of the State of Oklahoma within the time permitted by law (R. 1, *et seq.*). In said petition in error, petitioner complained of the trial court's judgment, specifying that it was erroneous because (2) it is not supported by any evidence; (3) it is contrary to all the evidence; (4) it is contrary to law; (5) it is unauthorized by law (R. 1).

That the federal questions, herein asserted, were presented to, decided by, and were necessary to the decision of, the appellate court, is shown by "Order of the Court and Certificate of the Chief Justice to Aid the Record" (R. 90) and journal entry thereof (July 29, 1943), appearing on the court's docket (see page 3 of the typewritten transcript; not in printed record). Such showing, together with the plead-

ings cited, are believed to sufficiently make the record disclose this Court's jurisdiction. *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 596, 57 L. ed. 982; *Marvin* v. *Trout*, 199 U. S. 212, 50 L. ed. 157.

The Supreme Court of the State of Oklahoma is the highest state court in which a decision of the controversy can be had.

The appellate court's judgment, affirming the trial court's denial of any relief to petitioner, is found at record 86 at the end of the opinion (R. 82-86). Journal entry making it part of the record February 2, 1943, appears on the Court's docket sheet (typewritten transcript, p. 3; not in printed record).

Said judgment was announced and filed on February 2, 1943. Petition for rehearing was denied by order entered June 15, 1943 (R. 86), and said decision thereby became final.

On June 22, 1943, on application of petitioner (R. 86), which was filed within the time allowed by the court's rules with professional statement of its counsel attached thereto, the court entered its order (R. 88) staying issuance of mandate for three months, to enable petitioner to apply to this Court for writ of certiorari to review said judgment. Said order was conditioned on petitioner's giving bond for security for costs to be approved by the Chief Justice of said Court. Said bond was approved and filed on July 1, 1943 (R. 89).

A complete transcript of the record of proceedings in the trial court and in the Supreme Court of the State of Oklahoma is filed herewith.

4. The case has been rather fully stated in the foregoing "Summary Statement of the Matter Involved." That portion of this petition, and the cases there cited, are adopted here as showing that the nature of the case and the rulings of the court on the federal questions involved were such as to bring the case within the jurisdictional provisions relied on. In addition, reference is made to Proposition 2 included in the "Argument" in the attached brief supporting this petition, and the cases there cited are hereby referred to as sustaining petitioner's contention that this Court has jurisdiction to review the judgment complained of.

III. QUESTIONS PRESENTED

Hereunder petitioner lists and, in connection with each thereof, cites authorities as showing that they present substantial federal questions, the questions herein presented (and which will be presented if the writ shall be granted) as follows:

1. Where tax rates have been the subject of a protest before the Court of Tax Review of the State of Oklahoma on the ground that they were computed without reference to the total legally assessed valuation of property liable therefor, and where dismissal of such protest for want of jurisdiction of such ground of complaint has been affirmed by the Oklahoma Supreme Court, and that court in its opinion as to such affirmance has cited cases showing that a taxpayers's remedy for such complaint is to bring such an action as petitioner brought in this case, attacking the same rates on the said ground of complaint, can the Oklahoma Supreme Court lawfully refuse to consider the said ground of illegality, basing its refusal on a state-

ment that said earlier decision finally determined the legality of said tax rates?

Hughes v. *U. S.*, 4 Wall. 232, 71 U. S. 232, 18 L. ed. 303.

2. Could an Oklahoma school district levy a tax for 1938 purposes, and determine the rate thereof by dividing its financial requirements by any figure other than that shown as the total assessed valuation of all property liable therefor as set forth in the abstract of 1938 assessed valuations required by Section 9, Chap. 115, Session Laws of Oklahoma 1933?

Provident Institution for Savings v. *Commonwealth of Massachusetts*, 6 Wall. 611, 73 U. S. 611, 18 L. ed. 907.

3. Can the property of a public service corporation in Oklahoma be charged with taxes computed by applying the rate thereof to a sum entered on the assessment rolls which does not appear on, and cannot be determined from, the face of the certified assessment of its property made by the State Board of Equalization?

Anniston City Land Co. v. *State*, 185 Ala. 482, 64 So. 110.

4. Where the record shows that a public service corporation did not render any of its property, for assessment, as having taxable situs in a given school district, can it be charged with taxes based on a figure purporting to be the assessed valuation of its property within such district where it has had no notice or opportunity to be heard?

Central of Georgia R. Co. v. *Wright*, 207 U. S. 127, 52 L. ed. 134.

5. Where the year's requirements, supposed to be raised by taxation, amount to $40,644.08 and rates of levy to raise said amount are computed by dividing said

sum by a figure supposed to equal the total assessed valuation of property liable for said levy but which, in fact, does not comprise the total of figures entered on the assessment rolls for property identifiable as having taxable situs within the levying district, are those taxpayers whose properties are listed as having such taxable situs, and so valued as to be required to pay $34,650.35, prejudiced and discriminated against when they are required to pay $34,650.35 toward said requirements and, also, to contribute a full proportion of the deficiency through taxation in future years?

Auditor General v. *Hughitt*, 132 Mich. 311, 93 N. W. 621.

IV. REASONS RELIED ON FOR GRANTING THE WRIT

The judgment, in so far as it is based on the appellate court's refusal to consider the complaint against the legality of the rates of levy, on the ground that the legality thereof was determined in *Texas-Empire Pipe Line Co.* v. *Tulsa County Excise Board*, 187 Okla. 591, 104 Pac. (2d) 441, is contrary to the Oklahoma Supreme Court's own decisions holding that, on a second appeal on the same question, it is bound to follow its earlier decision on said question as "the law of the case."

In re. Assessment of Kansas City So. Ry. Co., 175 Okla. 444 (445), 53 Pac. (2d) 536, and cases therein cited.

Also, it is contrary to said court's own decisions holding that where suit between the same parties over the same subject-matter has been the subject of a former appeal, and said appeal was disposed of without determining the merits of the controversy, the decision in the former appeal does not pre-

vent determination of the controversy on its merits in a second appeal. *Dickson* v. *Taylor et al.*, 129 Okla. 191, 263 Pac. 1102.

And such holding in the case at bar is not binding on this Court.

Zeckendorf v. *Steinfeld*, 225 U. S. 445, 56 L. ed. 1156.

Said judgment, on that point, so far departs from the accepted and usual course of judicial proceedings, and so far sanctions such a departure by the trial court, as to work complete denial of petitioner's rights, calling for the exercise of this Court's power to review.

Said earlier decision, affirming dismissal of complaint against the legality of said rates, attacked on the ground that they were fixed without reference to a legally determined total of the 1938 assessed valuation of property liable therefor, the grounds of said dismissal being that the question raised involved application of a legal levy to specific property and not the legality of the rate, is not reasonable, and is directly contrary to conclusions reached, on the same question, by the highest courts of other states.

Auditor General v. *Hughitt*, 132 Mich. 311, 93 N. W. 621;

Hersey v. *Bd. of Supervisors of Milwaukee County*, 16 Wis. 185, 82 Am. Dec. 713.

The record shows that the State Board of Equalization did not assess any property of public service corporations

for 1938 purposes of said four disorganized districts; therefore, it may not possibly be assumed that a total of such assessments might have been recorded by that board. This Court has said that an assessment, to be valid, should be recorded. *Illinois Central R. Co.* v. *Kentucky*, 218 U. S. 551 (559), 54 L. ed. 1147 (1149).

The record shows that the rates of levy are based upon figures resulting from blending 1938 assessed valuations of real estate with assessed valuations, as fixed by the assessing officers for earlier years. The record contains positive testimony that the valuations used for public service corporation properties were, in fact, the valuations of such properties as assessed for earlier years. See assessor's testimony at R. 48. As to personal property and properties owned by other types of corporations, compare the figures set out in paragraph 11 of the First Amended Petition (R. 11) with plaintiff's Exhibit 5 (R. 67-70; received in evidence, R. 52). This Court has held such assessments void.

People of the State of California v. *Central P. R. Co.*, 127 U. S. 1, 32 L. ed. 150.

The judgment sought to be reviewed, in so far as it is based on the appellate court's statement that the record before it, on appeal, does not contain evidence clearly showing that the assessor's acts, complained of, were not contrary to the acts of the State Board of Equalization in assessing petitioner's property, as shown by said board's record of such assessing acts, is not only unsupported by the record,

but is directly contrary to positive, undenied and undeniable evidence therein contained. Such judgment, therefore, on that feature of the case, is based upon non-federal grounds which are not substantial enough to support it, in themselves. This Court has jurisdiction to review such a judgment in certiorari proceedings.

Ward et al. v. *Board of County Commissioners of Love County, Oklahoma*, 253 U. S. 17, 64 L. ed. 751;

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux*, 279 U. S. 737, 73 L. ed. 931.

Said judgment, in so far as it holds that petitioner's rights were not violated by lack of notice and opportunity to be heard as to the 1938 assessment of its properties for the purposes of said disorganized districts, is probably not in accord with decisions of this Court on the question.

Central of Georgia R. Co. v. *Wright*, 207 U. S. 127, 52 L. ed. 134.

And said decision is directly contrary to the Oklahoma Supreme Court's earlier and still controlling decisions on the point.

In re. Moore (*Tulsa County* v. *Moore*), 182 Okla. 330, 77 Pac. (2d) 676;

Taber, County Treas., v. *Carter Oil Co.*, 176 Okla. 638, 57 Pac. (2d) 248.

The judgment, in so far as it holds that petitioner's complaint as to lack of notice and opportunity to be heard may be denied on authority of *Bonaparte* v. *American Vinegar Mfg. Co.*, 161 Okla. 54, 17 Pac. (2d) 441, is contrary to the

Oklahoma Supreme Court's statements differentiating the lack of notice, therein involved, from lack of notice, such as is involved in the case at bar, which is the same as the lack of notice involved in *Tulsa County* v. *Moore, supra,* which differentiation was set out in the opinion in said Moore case, to-wit:

> "In that (American Vinegar Mfg. Co.) case, however, THIS COURT POINTED OUT that one who had not rendered property for taxation had the right to appear before the board of equalization to be heard on any assessment thereof made by it" (182 Okla. 332).

V. ASSIGNMENTS OF ERROR

1. The Supreme Court of the State of Oklahoma erred in deciding a federal question of substance adversely to petitioner's contentions by disregarding applicable controlling decisions of said court and contrary to applicable controlling decisions of this Honorable Court.

2. The Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Tulsa County, Oklahoma, in that it thereby held and decided that the legality of the rates of levy, of which petitioner complained, had already been established by said appellate court's earlier decision affirming judgment and order of the Court of Tax Review of the State of Oklahoma dismissing, for want of jurisdiction, a complaint that said rates were illegal because they were not based, respectively, on lawful

abstracts of 1938 assessed valuations of all properties subject thereto.

3. Said appellate court erred in affirming the judgment of the District Court of Tulsa County, Oklahoma, in that it thereby held and decided that petitioner's property which was located, on January 1, 1938, within the respective areas of the four taxing units involved, was assessed by the State Board of Equalization as having taxable situs January 1, 1938, within said respective areas, and as having assessed valuations of $51,140.00 within the area of disorganized School District No. 4,$32,661.00 within the area of disorganized School District No. 12, $1,948,787.00 within the area of disorganized School District No. 28, and $17,079.00 within the area of disorganized Consolidated School District No. 1.

4. Said appellate court erred in affirming the judgment of said trial court in that it thereby held and decided that petitioner was not entitled to notice and opportunity to be heard before its property could be lawfully assessed by the State Board of Equalization as having 1938 taxable situs, and said assessed valuations, within said respective areas, and in that it thereby held and decided that the petitioner was liable for taxes levied for the purpose of the respective taxing units embracing said respective areas, regardless of the fact that such taxable situs and assessed valuations had been fixed without notice to petitioner, without petitioner's consent, and without affording, to petitioner, any opportunity to be heard with regard thereto.

5. Said appellate court erred in refusing to reverse the judgment of the District Court of Tulsa County, Oklahoma.

6. Said appellate court erred in holding that the county assessor of Tulsa County was authorized to enter, on the 1938 tax rolls for the four taxing units involved, as the 1938 assessed valuation of petitioner's property located in said districts, respectively, on January 1, 1938, figures which did not appear, and which could not be calculated or determined from any matter appearing, on the face of the State Board of Equalization's record of its 1938 assessment of petitioner's property, as certified to by the state auditor, and as transmitted by said board to said county assessor.

7. Said appellate court erred in failing to hold void, because violative of the Fourteenth Amendment to the Federal Constitution, the ordinance, levying the taxes complained of, and fixing the rates thereof.

8. Said appellate court erred in holding that petitioner had failed to allege and prove, according to the record before said court on appeal (1) that it had been deprived of any fundamental and substantial right; (2) that it had been injured; (3) that the rates complained of were fraudulently fixed, or (4) that the purported assessment of petitioner's property was fraudulently entered on the tax rolls of the four taxing units involved.

9. The Supreme Court of the State of Oklahoma erred in upholding, as uniform and non-discriminatory, the tax rates of which petitioner complains, and the procedure where-

by the taxes were levied on petitioner and its property, and whereby the taxes were collected from petitioner.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of the State of Oklahoma, commanding said court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the Supreme Court of the State of Oklahoma in the case which is entitled in that court: "In the Supreme Court of the State of Oklahoma, Public Service Company of Oklahoma, a Corporation, Plaintiff in Error, versus Joe T. Parkinson, County Treasurer of Tulsa County, Oklahoma, Defendant in Error, No. 30852," to the end that said cause may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that the judgment of the Supreme Court of the State of Oklahoma, entered in said cause, be reversed by this Honorable Court.

Respectfully submitted,

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Counsel for Petitioner.